NO. 94798-8

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Dependency of E.H.

R.R.,

Petitioner

v.

STATE OF WASHINGTON,
Department of Social and Health Services,

Respondent.

COURT APPOINTED SPECIAL ADVOCATE'S RESPONSE TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

Kathleen C. Martin, WSBA #25636
King County Superior Court
Dependency CASA Program
Attorney
Maleng Regional Justice Center
401 4th Avenue North, Room 3081
Kent, WA 98032
Telephone: (206) 477-2768

INTRODUCTION

E.H. is now nine years, nine months old and he entered the dependency system when he was six years, six months old. His Court Appointed Special Advocate (CASA) is Laura Clough, who also is the CASA for his five and six year old siblings. E.H. is one of eight siblings, two of whom are adults, and three are teen-agers who are also dependent and represented by attorneys. E.H.'s mother is in federal prison until 2019 and is unavailable to parent any of her children.

In August 2016, R.R. filed a motion in the juvenile court asking for appointment of counsel for E.H., but did not ask for appointment for his younger siblings. A Commissioner *Pro Tempore* denied the motion and R.R. moved to revise. Chief Dependency Judge Helen Halpert denied the motion to revise and denied the motion for counsel, issuing a memorandum decision in which she found "no benefit to [E.H.]" when there is "no alternative...to his remaining a dependent child." The court found that "sadly, the only choice for [E.H.] and his siblings is to be placed in foster care as dependent children." App. A. On March 30, 2017, the Court of Appeals Commissioner denied the mother's Motion for Discretionary Review, and on June 22, 2017, the Court of Appeals denied R.R.'s Motion to Modify the Commissioner's Ruling.

The CASA asks this Court to deny review as R.R. has not shown the decisions are erroneous; she has not shown any limitation on R.R.'s ability to act or that they change the status quo; she has not shown the Court of Appeals decision contradicts decisions of this Court.

STATEMENT OF THE CASE

E.H.'s mother, R.R., is incarcerated in federal prison with a release date of 2019. She had furloughs for some time which allowed her to travel to Washington to visit the children, but, at the time of the mother's motion for Discretionary Review, that furlough had been revoked, as the bureau of prisons had granted the furloughs by mistake.

E.H. has not lived with his mother since 2013, but his placement history is somewhat confusing. He has been in his current placement since January 30, 2015. App. G, CASA's App.

The mother's motion for appointment of counsel appears to have been prompted in part by the CASA's recommendation of adoption as a primary permanent plan in a February 2016 Report to Court. Motion at 5. R.R.'s motion ignores that in the May 2016 CASA Report to Court, Ms. Clough recommended adding guardianship as a permanent plan based on her conversations with E.H. and his *stated* wishes regarding his permanence. App. G, CASA App. at 16.

E.H. has suffered much trauma in his life. As reported by Ms. Clough in her reports to court, he has been diagnosed with Anxiety Disorder and Adjustment Disorder. His therapist reported that he "shut down" when his therapist broached the topic of his mother, and that he is anxious at the idea of separation from his current caregivers and finding himself alone. "He is obsessed with money; wanting to sell toys he is not using, almost as though he is preparing to take care of himself." CASA App. at 48. E.H. has disclosed that he believes it is "not okay for him to be happy," living in "bad" homes, physical abuse by his mother's friends, and being traumatized over his grandmother's shooting death. *Id.* at 21, 48.

The CASA spoke with E.H. three days before submitting her report to court regarding the mother's motion for appointment of counsel and "through his tears, he told [the CASA] that he wants to be reunited with his mother as soon as possible, and wants to make sure the CASA tells the court that he strongly desires to stay in his current placement until his mother can return to him." *Id.* at 16.

Ms. Clough reported to the court of the sadness E.H. feels if his older siblings fail to go to visits and her own efforts to engage E.H. in telephone or other communications with the older brother, which E.H. declined. *Id.* at 16.

At the time of the mother's motion before the Court of Appeals, the permanent plans established by the September 1, 2016 Permanency Planning Order for E.H., were primary plans for adoption or guardianship with an alternate plan of return to the mother, reflecting the CASA's recommendation for permanent plan that did not require termination of parental rights. The CASA has regular contact with E.H. and has been an active advocate for E.H.'s best interests. She has also followed the directive of RCW 13.34.105 to discuss issues before the court with E.H. and has presented his views and opinions to the court. The CASA submitted six of her Reports to Court with her response to R.R.'s motion for counsel which were attached to her Response to the Motion for Discretionary Review as "CASA Appendix." [1]

ARGUMENT

The issues for review are whether this court should grant review of the Court of Appeals decision, whether the juvenile court correctly applied the *Mathews* factors when considering appointment of counsel, and whether all children in dependency have a categorical right to appointment of counsel under Article 1, Section 3 of the Washington State Constitution.

[1] References to a lettered Appendix refer to those attached to R.R.'s motion for discretionary review before the Court of Appeals; CASA App. refers to the CASA's separate appendix attached to her Response to the mother's Motion for Review.

The Court-Appointed Special Advocate (CASA)—who, by statute, is a party to this case and is charged with representing the best interests of the child involved in the case, RCW 13.34.030(11), 13.34.100—submits that review by this Court is unwarranted and that the Court of Appeals properly denied review, that the juvenile court properly applied the *Mathews* factors when considering R.R.'s motion for counsel, and that a *Gunwall* analysis supports denial as a matter of right under the Washington State Constitution. *State v. Gunwall,* 106 Wash.2d 54, 720 P.2d 808 (1986). The Department of Social and Health Services (the Department) explains in its Response why review should be denied and thoroughly analyzes the *Gunwall* factors, and the CASA does not repeat those arguments, but focuses on the constitutionality of RCW 13.34.100(7)(b) and the discretion granted to the lower court when considering appointing counsel for children.

A. The juvenile court did not err in applying the *Mathews* factors to deny appointment of counsel for E.H. and the Court of Appeals decision is consistent with decisions of this Court.

In 2012, this Court held in *M.S.R.* that RCW 13.34.100, which grants the juvenile court discretion over appointment of counsel for children, was constitutional:

"[C]hildren whose parents are subject to dependency and termination proceedings have vital liberty interests at stake and may constitutionally be

entitled to counsel, if necessary to protect those interests. But whether any individual child is entitled to counsel must be decided case by case. We hold that RCW 13.34.100(6)[2] is constitutionally adequate and that the deprivation, if any, of a child's right to counsel in such circumstances may be protected by appellate review." *In re Dependency of M.S.R.* 174 Wn.2d 1, 271 P.3d 234 (2012).

The Court further held that while due process demands appointment of counsel for some children, "the right to appointment of counsel is not universal. We further hold that RCW 13.34.100(6) is constitutionally adequate to protect the right of counsel for such children." *Id.* at 22. While *M.S.R.* specifically addressed appointment of counsel for children in a termination proceeding, the decision upholds the underlying principal that a court should have the discretion over appointment of counsel. The *M.S.R.* Court was instructed by the *Lassiter* Court that the appropriate method to reach a decision whether due process demands appointment of counsel is for the lower court to apply the *Mathews* factors. *M.S.R.* at 15, citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32, 101 S.Ct. 2153, 68

[2] RCW 13.34.7(a) currently applies to children in dependency; RCW 13.34.100 was amended effective July 1, 2014 and Section (6)(a) now applies only to children who have been legally free six months and have not achieved permanence.

L.Ed.2d 640 (1981); *Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct.893, 47 L.Ed.2d 18(1976)).*

Neither *M.S.R.* nor the statute stands for the proposition that E.H. must be appointed counsel, but both the statute and case law demand that his individual circumstances must be considered when the court decides that issue.

The Court of Appeals Commissioner acted completely within the bounds of prior decisions of this Court when considering the juvenile court's detailed memorandum decision with analysis of the *Mathews* factors and the *Gunwall* factors and her ruling considered both the questions of abuse of discretion and whether the mother established grounds for finding a constitutional requirement of appointment of counsel. The discretion granted by RCW 13.34.100 over whether the juvenile court orders appointment of counsel for children in dependency proceedings has been upheld and supports the Court of Appeals review under the abuse of discretion standard, and the ruling to deny the mother's motion for review. The Commissioner's ruling should stand and review by this Court should be denied.

B. The Juvenile Court correctly considered the *Mathews* factors and correctly decided that, given this child's individual and unique circumstances, due process did not require appointment of counsel.

Under *Mathews,* the court must consider, "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews*, 424 U.S. 310 at 903. This mandate is a threshold for the lower court to determine whether, after applying the factors, the child's due process rights can only be protected by appointment of counsel. If the court acts within the discretion allowed to decline appointment in the particular circumstances, the court's decision should be reviewed for abuse of discretion.

The Court in *M.S.R.* held that each case must be decided on its individual facts and that in *M.S.R.* there was no constitutional violation of the children's rights because there was no evidence to show that appointment of counsel was necessary. *M.S.R.* at 22. The juvenile court addressed each factor in R.R's motion, recognizing that E.H. has a significant interest in the proceedings and his interests are those identified in *M.S.R.*: Those are removal from home, placements in foster care, and being placed in the care of parents who cannot safely or adequately parent the child. E.H.'s circumstances are particular in that there is no alternative for his placement in foster care. His liberty and contact with his biological family have been unalterably impaired by his mother's incarceration and

the abuse and trauma which predated the dependency action. *M.S.R.* also requires lower courts to consider "each child's individual and likely unique circumstances" when deciding whether due process demands appointment of counsel. *M.S.R.* at 22. Here, as the Appellate Court Commissioner found, the juvenile court did consider E.H.'s individual and unique circumstances. The Appellate Court found that R.R.'s argument that there was "much an attorney could have done for E.H." failed, as the CASA is obligated to advocate for both the child's best interests, but also the child's expressed wishes. Op. at 5.

The juvenile court also considered whether adding or substituting counsel for the CASA would bring value to protecting E.H.'s interests and prevent erroneous deprivation. App. A at 9. Ms. Clough's reports to court in response to the mother's motion show that she has provided active advocacy for E.H.'s best interests throughout her tenure on this case. She took great care when gathering information from him about the mother's motion for counsel and there is no evidence from the mother that an attorney for E. H. will protect his liberty interests more that his CASA has by advocating for his best interests, or how an attorney would prevent erroneous deprivation. As much as he wishes to live with his mother, her incarceration prevents him from living with her; contact between he and his siblings and mother are unalterably affected by their family's dispersal

when she entered prison in 2013. The mother's claim that advocating for any permanent option other than return to the mother is something only an attorney could or would have done, but the CASA for E.H. not only recommended what she believed to be in E.H.'s best interests, but she "was clear in informing the court of E.H.'s wish that he be returned to his mother when she is released." Op. at 5.

R.R. claims that an attorney, "could have advocated for visits with his older brothers," implying that the CASA never advocated for those visits because she is also the CASA for E.H.'s younger siblings. Motion at 12. The CASA's report on August 22, 2016 contradicts this claim by R.R. and shows that she not only advocated for the visits, but offered to help with arrangements. App. A, 10, 11; CASA App. at 16.

Even if E.H. had an attorney, that would not change the fact that some of his siblings are adults so the court cannot order contact; some of his siblings are either not safe or available to visit at will; and, at the time of the hearing on September 1, 2016, one of the siblings was on the run and his whereabouts were unknown. App. A, 10, 11.

E.H. wanted visits with his older brothers, and was very disappointed when one of his brothers failed to come for a visit after special arrangements had been made. The CASA offered to help E.H. arrange at least telephone visits with the brother, but E.H. declined. The CASA

reported to the court that she would "revisit the sibling contact with [E.H.] periodically." App. G, CASA's App. at 16.

Best interest representation by a guardian ad litem (GAL) or CASA is fundamental to protecting children in dependency proceedings and is a well-established right, upheld by *M.S.R.* and codified in the Child Abuse Prevention and Treatment and Reform Act (CAPTA) which requires:

> [every state to have] provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings— (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child...42 U.S. Code § 5106a (2)(B)(xiii)

Under RCW 13.34.105 the CASA is obligated:

> To investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child; (b) To meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court; (c) To monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order. . . (e) Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties; (f) To represent and be an advocate for the best interests of the child.

The purpose of appointing an advocate for the child is to protect the child's interests. *In re Dependency of R.H.*, 129 Wn. App. 83, 89, 117 P.3d 1179 (2005). Washington State Guardian ad Litem Rules instruct a CASA and requires the CASA to "become informed about case[s]...make reasonable efforts to become informed about the facts of the case and to contact all parties...examine material information and sources of information, taking into account the positions of the parties." GALR(2)(g).

The juvenile court found that "it is unclear what counsel could contribute that a conscientious CASA represented by counsel cannot." App. A., 10. This conclusion was borne out through the number of reports to court Ms. Clough provided which have detailed descriptions of each of the three siblings' particular circumstances. There is no room for the claim that the court was not provided with E.H.'s stated desires both for himself and his mother. That his stated wishes do not coincide with what *can* occur, given his mother's situation cannot be remedied by appointment of an attorney.

The legislature has recognized that not every child in every dependency or termination proceeding is developmentally capable or even safe if they have to choose between what the parents ask of the court and what they themselves may want. RCW 13.34.105 grants the CASA

discretion about whether it is appropriate for a child to be required to make a decision or weigh in on the emotionally charged issues before the court in dependency and termination proceedings. Fortunately for E.H., he trusts Ms. Clough and she has reported his expressed opinions to the court. While Ms. Clough has advocated for E.H.'s permanence by recommending guardianship as a permanent option, she has never failed to let the court know that E.H. himself wants to live with his mother.

E.H. is in the most unfortunate of circumstances and as a child with a traumatic history, family violence, separation, and clearly in need of special services, he also has the protection afforded by RCW 13.34.100 in that he has a CASA to represent his best interests in court. He is protected by RCW 13.34's requirement that the court regularly hear updates on his situation and RCW 13.34.105's requirement that his CASA report to the court. He also is protected by RCW 13.34.100(7)(b), which allowed the court to review his circumstances to determine whether or not an attorney could assist him.

The juvenile court judge did not commit obvious or probable error when, after examining all the information before the court, she found that E.H.'s particular circumstances are such that an attorney would not add to the court's knowledge of his opinions or views on matters before the court, and an attorney would not be able to lessen the impact of the dependency

on him, allow him to live with his mother, or shorten the time he will spend in legal limbo.

C. RCW 13.34.100 is presumed to be constitutional and Article 1, Section 3 should not be read as requiring appointment of counsel for all children in dependency.

In her ruling, the Commissioner referenced "several recent unpublished opinions" of the Court of Appeals, Division 1, which have declined to grant broader due process protections under Art. 1, section 3 than are granted by the Fourteenth Amendment on the grounds that even if that appointment of counsel was required, the denial was harmless error due to the circumstances of each case. Op. at 7. In addition to those opinions, in a published comprehensive opinion applying a *Gunwall* analysis, the *Mathews* factors, and *M.S.R.'s* affirmation that statutes are presumed to be constitutional, the Court of Appeals, Division 2, held "that neither the Washington nor the United States Constitutions require juvenile courts to appoint counsel for children who are the subject of dependency proceedings." *In re S.K.-P.*, No. 48299-1-II, 2017 WL 3392279, n.11.

The Court of Appeals Commissioner properly ruled that statutes are "presumed to be constitutional" barring a showing "beyond a reasonable doubt that the statute is unconstitutional and a party who challenges the statute bears the burden to show beyond a reasonable doubt that it is not constitutional." *Amunrud v. Bd. Of Appeal,* 158 Wn.2d 208, 215, 143 P.3d

571 (2006); *Bellevue School Dist. v. E.S., 171 Wn.2d 695, 710-714, 257 P.3d 570 (2011; Fed. Way Sch. Dist. No. 210 v. State,* 167 Wash.2d 514, 523–24, 219 P.3d 941 (2009); *M.S.R.* 174 Wn.2d at 12-13. The Court of Appeals also properly relied on *Isla Verde Int'l Holdings* when deciding the case on non-constitutional grounds. *Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 752, 49 P.3e 867 (2002). Op. at 6. Further, "when an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." *Tunstall ex rel. Tunstall v. Bergeson,* 141 Wash.2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528 (2000), *Senear v. Daily Journal–American,* 97 Wash.2d 148, 152, 641 P.2d 1180 (1982). "[T]he court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case..." and " '[A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied.' " *Tunstall* citing *JJR Inc. v. City of Seattle,* 126 Wash.2d 1, 3–4, 891 P.2d 720 (1995) and *In re Detention of Turay,* 139 Wash.2d 379, 417 n. 27, 986 P.2d 790 (1999).

The juvenile court examined whether the Washington constitution expands due process rights to include appointment of counsel for all children and properly found that there is no "independent basis for

appointing counsel." App. A. "[T]raditionally, [the Court] has practiced great restraint in expanding state due process beyond federal parameters." *Rozner v. Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991); *State v. Spurgeon*, 63 Wn.App. 503, 820 P.2d 960 (1991).

When considering whether all children in truancy proceedings are entitled to counsel, this Court, hearing similar due process arguments from the petitioner as R.R. makes now, found that "the fact that [a] statute explicitly provides the right to counsel cuts against [the petitioner's] argument because it shows that the legislature is capable of requiring counsel in circumstances where it deems counsel necessary. *Bellevue School District* at 712.

A similar situation exists in dependency proceedings. RCW 13.34.100 reinforces the federal requirement that all children in dependency proceedings have a right to best interests' advocacy, but the legislature has addressed those instances where it determined that due process does demand appointment for children. In 2014, the statute was amended to include that if a child is legally free for six months and is not already represented by counsel, the court shall appoint counsel. RCW 13.34.100(6)(a). The statute was amended in 2010 to require both the Department and the GAL or CASA to notify a child of his or her right to counsel when they reach of twelve, inquire as to whether the child wishes

an attorney, to repeat the notification ever year subsequently if the child has not been appointed counsel, and for the GAL to report the efforts taken to the court. RCW 13.34.100(7)(c).

R.R. argues that since parents have a right to counsel in dependency proceedings in Washington, it must follow that all children have a right to counsel. However, if R.R. did not have appointed counsel, she would have to fend for herself *pro se* through the complexities of the dependency proceedings. The court addressed the issue of appointment of counsel for indigent parents at the dependency stage and found that even in the early or preliminary stages of the proceedings, the parents have a right to be represented. *In re Welfare of Myricks*, 85 Wn.2d 252, 254, P.2d 841 (1975). The father in *Myricks* requested appointment of counsel to represent him at a detention hearing for his son on the same day the Department filed a dependency petition alleging the father had neglected the youth. The court denied appointment for the father and ordered the child placed into foster care pending a fact-finding hearing on the petition. The father also had to appear at a subsequent fact-finding without counsel.

The court found that without counsel:

> [t]he full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence

and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the trial court. The right to one's child is too basic to expose to the State's forces without the benefit of an advocate. *Id.*

E.H. was protected by the Court, the CASA, and the State, all as intended by the statute, and his circumstances should be differentiated from his mother's. While the mother argues that the CASA's attorney added no protection for E.H., the courts recognized that having an attorney for the CASA guarantees that the CASA has the ability to bring matters before the court when needed. An attorney for the CASA means that the CASA may file motions, act as a full party on behalf of E.H. and is educated about the legal issues regarding the child.

The statute should be construed as the legislature intended and R.R. has not shown beyond a reasonable doubt that the statute is unconstitutional or that Art. 1, Section 3 requires appointment of counsel for all children in dependency.

CONCLUSION

Review by this Court should be denied. There was no evidence that having an attorney would have afforded E.H. additional protections in court or kept him from having to be in foster care. The Appeals Court denial of review was proper as the Commissioner correctly reviewed the juvenile court's decision for abuse of discretion and correctly found that the juvenile

court's application of the *Mathews* factors, the *Gunwall* factors, and did not commit probable or obvious error when denying the mother's motion for appointment of counsel for E.H.

RESPECTFULLY SUBMITTED this 28th day of August, 2017.

Kathleen C Martin

Kathleen C. Martin, WSB # 25636
Attorney for CASA, Laura Clough

KING COUNTY SUPERIOR COURT

August 28, 2017 - 11:48 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94798-8
Appellate Court Case Title:	In re the Dependency of: E.H.

The following documents have been uploaded:

- 947988_Other_20170828114533SC732509_7211.pdf
  This File Contains:
  Other - CASA Response to Petitioners
  The Original File Name was CASA Response to Petitioner Motion for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- ZacharyB@ATG.WA.GOV
- april.rivera@kingcounty.gov
- casa.group@kingcounty.gov
- jan@washapp.org
- kathleen.martin@kingcounty.gov
- kellyt1@atg.wa.gov
- shsseaef@atg.wa.gov
- wapofficemail@washapp.org

Comments:

Sender Name: Vickey L Wilson - Email: vickey.wilson@kingcounty.gov

Note: The Filing Id is 20170828114533SC732509